

**Simon Lim (in his capacity as the administrator of the estate of
Chen Hon Chow (f), deceased) v Colonel Christian Lim Xiao
Ping & Anor**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
Q-02-1220-07 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD
ABRAHAM JJCA
22 MARCH 2016

*Trusts — Administration of estate — Executor — Appellant named as executor of
estate of deceased under last will and testament — Appellant and respondents
named as beneficiaries — Appellant refused to act in accordance with will
— Whether appellant entitled for monies he spent for deceased — Whether claim
legally recoverable — Whether expenses incurred by appellant agreed by deceased at
material times — Whether appellant had authority under provision of will to deal
with residue of estate — Whether appellant performed all obligations as to
principal distribution of estate — Whether appellant had caveatable interest on
land*

One Chen Hon Chow ('the deceased') died on 14 June 2011 leaving a last will and testament ('the will'). The appellant (the deceased's son) was named as the executor of the estate whereas the beneficiaries of the will were the appellant and the respondents (his two nephews). The estate of the deceased consisted of two pieces of land and monies in fixed deposit accounts held in various banks. The will bequeathed the appellant with a piece of the land and fixed deposits in two banks whereas the other piece of land and fixed deposits in four other banks were to be shared equally by the respondents. However, having transferred a piece of the land (Lot 1071) and all the monies in two of the fixed deposit accounts to himself, the appellant refused to transfer the other piece of land (Lot 1070) and the remaining monies in the bank to the respondents. The appellant also entered a caveat on the other piece of land. The respondents therefore filed an action against him by way of originating summons seeking for orders that the appellant to: (a) transfers the said land to them; (b) transmit and pay out the money in the fixed deposit accounts to them; (c) remove the caveat entered by him on the said land, and (d) pay their legal cost of RM150,000. The learned judge allowed the application. Hence, this appeal by the appellant. Learned counsel for the appellant contended that the learned judge had never considered the evidence that the appellant had affirmed in para 2 of his affidavit in opposition and para 6 of his statutory declaration that he had spent RM158,563 on his mother's medical expenses and care. It was further contended that para 2 of the will clearly authorised the appellant to pay

- A all the deceased's just debts, household bill, medical bills etc, which in this case amounted to RM158,563 and that para 6 of the appellant's statutory declaration was never challenged by the respondents. Learned counsel also submitted that para 7 of the will gives full authority to the appellant as executor of the will to deal with the residue of the estate, which may include the distribution of the estate to his children. Lastly, it was contended that the demand by the respondents for the transfer of the land to them was detrimental to the appellant as executor of the estate and was clearly against the interest and spirit of the will. Learned counsel further contended that, from the reading of para 4 of the respondents' affidavit in reply, it was obvious that the respondents demanded for the transfer not only of Lot 1070 but also Lot 1071.

Held, dismissing the appeal with costs of RM5,000:

- D (1) The fact that the appellant had in his affidavit in opposition and statutory declaration averred and declared that he had spent the amount RM158,563 on the medical bills and other expenses in taking care of the deceased during her lifetime was insufficient. It was incumbent on the appellant to show more cogent evidence of the spending by producing medical receipts and household bills that he had paid. On the facts, the appellant had not produced or exhibited any documentary evidence in his affidavit of the various payments that he had made throughout the years in taking care of the deceased (see para 13).
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- F (2) The will was silent on the recoverability of the money spent for the deceased's benefit by the named executor of the will. From the reading of para 2 of the will, there was no provision for the executor to recover any of the expenses that he had undertaken for the sole benefit of the deceased from the estate. To enable the appellant to claim the sum RM158,563 as legally recoverable debt from the estate, he must show that the expenses he had incurred had been agreed by the deceased at the material times (see paras 14–16).
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- H (3) Learned counsel was right to say that the appellant as the executor had the authority under the provision of the will to deal with the residue of the estate. However the residue of the estate could only come into play once all the obligations as to the principal distribution of the estate had been performed. The appellant as the executor of the estate had not completed the distribution of the estate according to the wishes of the testator in her will. Therefore, there could not be any residue in the estate for the appellant to distribute to his children who were not named in the will even if he had wanted to, under the power given to him under the said will (see para 17).
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- (4) The court was of the view that, the grounds stated by the appellant in his statutory declaration to support the entry of the caveat did not disclose any caveatable interest. The sum of RM158,563 claimed by the appellant

as expenses he had expended on the deceased had not been proved to be legally recoverable debt from the estate. Learned counsel's argument that the respondents were demanding all the lands left by the testator was unsustainable and not supported by evidence. Firstly, the respondents did not challenge the facts that Lot 1071 had been transferred to the appellant and secondly, the respondents only claimed what was rightly due to them under the will. The balance of convenience did not favour the appellant to have the caveat remains on the said land until he can prove his entitlement to be repaid the amount of RM158,563 that he claimed he had purportedly expended for the benefit of the deceased (see para 18).

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[Bahasa Malaysia summary]

Seorang yang bernama Chen Hon Chow ('si mati') meninggal dunia pada 14 Jun 2011 meninggalkan wasiat terakhir. Perayu (anak lelaki si mati) dinamakan sebagai wasi harta pusaka manakala benefisiari-benefisiari wasiat adalah perayu dan responden-responden (dua orang anak buahnya). Harta pusaka si mati terdiri daripada dua bidang tanah dan wang dalam akaun deposit tetap dalam pelbagai bank. Wasiat mewariskan perayu dengan sebidang tanah dan deposit tetap dalam dua bank manakala satu bidang tanah lagi dan deposit tetap dalam empat buah bank lagi perlu dikongsi bersama oleh responden-responden. Walau bagaimanapun, selepas memindah milik sebidang tanah (Lot 1071) dan kesemua wang dalam dua deposit tetap kepada dirinya, perayu enggan memindahkan satu bidang tanah lagi (Lot 1070) dan wang baki dalam bank kepada responden-responden. Perayu juga memasukkan kaveat dalam satu bidang tanah lagi. Dengan itu, responden-responden memfailkan satu tindakan terhadapnya melalui saman pemula, memohon perintah agar perayu memindah milik tanah tersebut kepada mereka; memberikan dan membayar wang dalam akaun deposit tetap kepada mereka; menyingkirkan kaveat yang dimasukkan olehnya dalam tanah tersebut; dan membayar kos guaman sebanyak RM150,000. Hakim membenarkan permohonan. Oleh itu, rayuan ini oleh perayu. Perayu menghujahkan bahawa hakim tidak mempertimbangkan keterangan bahawa perayu telah mengesahkan dalam perenggan 2 afidavit membantah dan perenggan 6 deklarasi statutorinya bahawa dia telah membelanjakan RM158,563 bagi perbelanjaan dan jagaan perubatan ibunya. Seterusnya diujahkan bahawa perenggan 2 wasiat memberikan perayu kuasa untuk membayar kesemua hutang si mati, bil rumah, perubatan dan lain-lain, yang dalam kes ini terjumlah kepada RM158,563 dan bahawa perenggan 6 deklarasi statutori perayu tidak dicabar oleh responden-responden. Dihujahkan lagi bahawa perenggan 7 wasiat memberi kuasa penuh kepada perayu sebagai wasi wasiat untuk menguruskan baki harta pusaka, yang mungkin melibatkan pembahagian harta pusaka kepada anak-anaknya. Akhir sekali, diujahkan bahawa tuntutan oleh responden-responden bagi pindah milik tanah kepada mereka menjejaskan perayu sebagai wasi harta pusaka dan jelas bertentangan

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- A dengan kepentingan dan maksud tersirat wasiat. Dihujahkan lagi bahawa bacaan perenggan 4 afidavit balasan responden-responden bahawa jelas yang responden-responden menuntut pindah milik bukan sahaja Lot 1070 tetapi juga Lot 1071.
- B **Diputuskan**, menolak rayuan dengan kos RM5,000:
- C (1) Fakta bahawa perayu telah, dalam afidavit bantahan dan deklarasi statutorinya menghujahkan dan mengisytiharkan bahawa dia telah membelanjakan sebanyak RM158,563 bagi bil perubatan dan lain-lain perbelanjaan untuk menjaga si mati semasa hayatnya, tidak mencukupi. Perayu wajib menunjukkan bukti kukuh perbelanjaan dengan mengemukakan resit-resit perubatan dan bil rumah yang telah dia bayar. Berdasarkan fakta, perayu tidak mengemukakan atau melampirkan apa-apa keterangan dokumentar dalam afidavit pelbagai bayarannya yang telah dibuatnya dalam tahun-tahun dia menjaga si mati (lihat perenggan 13).
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- E (2) Wasiat tidak menyatakan apa-apa tentang sama ada wang yang dibelanjakan boleh dipulangkan bagi manfaat wasi yang dinamakan dalam wasiat. Berdasarkan bacaan perenggan 2 wasiat, tiada peruntukan untuk wasi mendapatkan semula daripada harta pusaka, semua perbelanjaan yang dibuat olehnya bagi manfaat tunggal si mati. Untuk membolehkan si mati menuntut jumlah RM158,563 sebagai hutang yang boleh diperolehi semula daripada harta pusaka, dia mesti menunjukkan bahawa dia telah mengeluarkan belanja yang dipersetujui oleh si mati pada masa-masa material (lihat perenggan 14–16).
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- G (3) Hujahan bahawa perayu sebagai wasi mempunyai kuasa di bawah peruntukan wasiat untuk menguruskan baki harta pusaka adalah betul. Walau bagaimanapun, baki harta pusaka hanya terlaksana apabila semua kewajipan pembahagian utama harta pusaka telah dilaksanakan. Perayu sebagai wasi harta pusaka tidak melakukan pembahagian harta pusaka seperti yang dikehendaki oleh pembuat wasiat dalam wasiatnya. Oleh itu, tidak boleh ada baki dalam harta pusaka untuk dibahagikan kepada anak-anaknya yang tidak dinamakan dalam wasiat jikapun dia berniat sedemikian di bawah kuasa yang diberikan kepadanya di bawah wasiat tersebut (lihat perenggan 17).
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- I (4) Mahkamah berpendapat bahawa alasan-alasan yang dinyatakan oleh perayu dalam deklarasi statutorinya untuk menyokong kemasukan kaveat tidak mendedahkan apa-apa kepentingan yang boleh dikaveatkan. Jumlah RM158,563 yang dituntut oleh perayu sebagai perbelanjaan yang dikeluarkan buat si mati tidak dibuktikan di bawah undang-undang sebagai hutang yang boleh diperolehi semula daripada harta pusaka. Hujahan bahawa responden-responden menuntut kesemua tanah yang ditinggalkan oleh pembuat wasiat tidak boleh dibenarkan dan tidak

disokong oleh keterangan. Pertamanya, responden tidak mencabar fakta bahawa Lot 1071 telah dipindah milik kepada perayu dan keduanya, responden-responden hanya menuntut apa yang sebetulnya terhutang kepada mereka di bawah wasiat. Imbangan kebarangkalian tidak berpihak pada perayu untuk mengekalkan kaveat tanah tersebut hingga dia boleh membuktikan haknya untuk dibayar RM158,563 yang didakwa dibelanjakan olehnya bagi manfaat si mati (lihat perenggan 18).]

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Notes

For cases on executor, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 2974–2975.

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Cases referred to

Choo Toing Hiu & Ors v Choo Hock Swee [1959] 1 MLJ 67, CA (refd)

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Legislation referred to

Administration of Estate Ordinance (Cap 80) s 17

Appeal from: Originating Summons No KCH-24–188 of 2013 (High Court, Kuching)

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Ernest Chua (Ernest Chua & Co Advocates) for the complainant.
Arthur Lee Cheng Chuan (Lee Yi Eng with him) (Arthur Lee, Lin & Co Advocates) for the respondents.

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Abdul Aziz Abdul Rahim JCA (delivering judgment of the court):

[1] One Chen Hon Chow ('the deceased') died on 14 June 2011 leaving a last will and testament ('the said last will'). She has two sons. Simon Lim ('Simon'), the appellant (the defendant in the High Court) and another. Simon was named the executor of the estate of the deceased. The estate of the deceased consisted of two pieces of land and monies in fixed deposit accounts held in various banks. They are as follows:

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- (a) Lot 1070 Block 218 Kuching North Land District situate at Arang Road Kuching;
- (b) Lot 1071 Block 218 Kuching North Land District situate at Arang Road Kuching;
- (c) fixed deposit account Nos 1101–0292515–68–7, 11010284475–68–0 and 11030004340–68–2 (all at Bumiputra Commerce Bank Bhd);
- (d) fixed deposit account No 33–045–201557–3 (Hong Leong Bank); and
- (e) fixed deposit account No 1103–0004340–68–2 (CIMB Bank Bhd).

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A [2] The beneficiaries under the said last will are Simon and two grandchildren of the deceased who are the children of the Simon's brother.

B [3] The will bequeathed Simon with a piece of the land and fixed deposits in two banks. The other piece of land and fixed deposits in four other banks were to be shared equally by the two grandchildren of the deceased. However, having transferred a piece of the land (Lot 1071) and all the monies in fixed deposit account No 33-045-201557-3 (Hong Leong Bank); fixed deposit account No 1103-0004340-68-2 (CIMB Bank Bhd) to himself as bequeathed in the said last will, Simon refused to transfer the other piece of land (Lot 1070) and the monies in the bank to his two nephews, the grandsons of the deceased named in the said last will. Simon also entered a caveat on the other piece of land. His nephews (the plaintiffs in the High Court) therefore filed an action against him by way of originating summons seeking for orders that Simon

C (i) transfers the said land to them; (ii) transmit and pay out the money in the fixed deposit accounts to them; (iii) remove the caveat entered by him on the said land, and (iv) pay their legal cost of RM150,000.

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E [4] The plaintiffs' affidavit in support of the originating summons was affirmed by the first plaintiff Colonel Christian Lim Xiao Ping on 18 December 2013 as to the undisputed facts stated above.

[5] Simon opposed the originating summons and had filed an affidavit in opposition affirmed on 17 February 2014.

F [6] The reasons given by Simon for refusing to effect the transfer of the other piece of land and to transmit the monies in the fixed deposit accounts to the plaintiffs can be seen from the averment in para 2 of his affidavit in opposition:

G 2. I refer to paragraph 2 of the Last Will of Chen Hon Chow which clearly stipulates that as the Executor I am authorised to collect all monies due to my late mother from any and all sources — and to hold trust and after paying my late mother's just debts, household bills, medical bills, funeral and any testamentary expenses to distribute the same in accordance with my late mother's Last Will. I am advised my Counsel Mr Ernest Chua & I verily believe to be true that as the Executor and

H Trustee of the Last Will of my late mother Chen Hon Chow I am duty bound and legal entitled to collect all moneys due to my late mother, pay out all hers just debts and other expenses named in paragraph 2 of my late mother's Last Will and distribute the balance (if any) to all the beneficiaries named in the Last Will of the Late Chen Hon Chow.

I [7] As for the caveat that he had entered on the land (Lot 1070) Simon averred in paras 9 and 10 of his affidavit in opposition as follows:

9. In reply to paragraph 8 (ii) of Colonel Lim's Affidavit I contend that the Caveat lodged by the Defendant was based on a Statutory Declaration affirmed by me on

12.12.2012. A copy of the said Caveat dated 12th December 2012 and a copy of the Statutory Declaration dated 12th December 2012 is now shown to me and exhibited hereto marked as 'A' & 'B' respectively.

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10. I now crave leave to refer to paragraphs 6, 7, 8 & 9 of my Statutory Declaration dated 12th December 2012. I am advised by my Counsel Mr Ernest Chua and I verily believe to be true that based on the said paragraphs 6, 7, 8 & 9 of my Statutory Declaration I have a Caveatable interest on the said land, namely Lot 1070 Block 218 Kuching North Land District.

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[8] In his statutory declaration dated 12 December 2012 Simon justified his caveatable interest as follows:

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6. Before my mother Chen Hon Chow passed away on 14th of June 2011 she had been very ill and bed ridden for more than 3 years. I was the ONLY one looking for her and I employed maids to help look after her. I was the only one providing finance to nurse her and to keep her as comfortable as I could. I have expended a sum of RM158,563.00 to look after my late mother. On the other hand, the two grandsons, namely, Colonel Christian Lim Xiao Ping and Pius Elijah Lim Hsien Ping had not spent a single cent on my late mother. Moreover they seldom visited my late mother for the last 3 years before she passed away.

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8. As the sole care taker of my late mother (the deceased) as as the Executor and Trustee of the Last Will of Chen Hon Chow I say that I am entitled to recover all the expenses paid by me, i.e. the sum of RM158,563 — from Colonel Christian Lim Xiao Ping and Pius Elijah Lim Hsien Ping.

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9. For the recovery of the said sum of RM158,563 — from Colonel Christian Lim Xiao Ping and Pius Elijah Lim Hsien Ping and to protect my interest in the said land I intend to lodge a Caveat on the said land. I say that I have a caveatable interest in the said land.

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10. The purpose of making this Statutory Declaration is to support my Caveat on the said land, namely Lot 1070 Block 218 Kuching North Land District.

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[9] The learned judge heard the application and allowed it. Not satisfied with the decision Simon now appeals to this court. This is his appeal.

HIGH COURT FINDINGS

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[10] Relying on s 17 of the Administration of Estate Ordinance (Sarawak) ('the Ordinance') on the duties of an executor of the estate, the learned judge ruled that for the debt claimed by Simon to be 'legally recoverable' the alleged expenses must have been agreed by the deceased to be so at the time they were incurred. Secondly, the learned judge found that there is no evidence — 'a total absence of evidence' — that Simon had indeed spent RM158,563 on medical expenses and caring of the deceased. Her Ladyship also held that 'if the sum expended at that time was simply from the goodness of his heart as any filial son whose mother was under his sole care at that material time, then the amount is

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A not 'legally recoverable'. She relied on the Singapore's Court of Appeal decision in *Choo Toing Hiu & Ors v Choo Hock Swee* [1959] 1 MLJ 67. Further she held that Simon could not use the non-naming of his children as beneficiaries in the said will as an excuse not to distribute the estate as the deceased had wanted in her will.

B THE APPELLANT'S COUNSEL SUBMISSION

[11] In his written submission, and repeated in his oral submission before us, learned counsel submitted five grounds on this appeal. Firstly, the learned judge erred in holding that there is a total absence of evidence that the Simon actually had spent RM158,563 on his late mother. He argued that Simon had affirmed in para 2 of his affidavit in opposition and para 6 of his statutory declaration that he had spent that sum on his mother's medical expenses and care. This evidence, learned counsel said, was never considered by the learned judge. Secondly, the learned judge erred in fact and in law by holding that the sum RM158,563 must have been agreed by the deceased to be recoverable or claimable at the time the expenses were incurred for it to be 'legally recoverable' under s 17 of the Ordinance. Learned counsel argued that para 2 of the said last will and testament clearly authorised Simon to pay all the deceased's just debts, household bill, medical bills etc, which in this case amounted to RM158,563. He also argued that para 6 of Simon's statutory declaration was never challenged by the respondents. Thirdly, learned counsel submitted that the learned judge erred in fact and in law in holding that the nonnaming of Simon's children as beneficiaries of the estate of the deceased could not be a ground for not distributing the assets to the plaintiffs. He argued that para 7 of the last will and testament of the deceased gives full authority to Simon as executor of the said last will to deal with the residue of the estate, which may include the distribution of the estate to Simon's children. The fourth and fifth grounds of appeal by Simon, the appellant is in relation to the caveat. Learned counsel submitted that the demand by the plaintiffs for the transfer of the land to them is detrimental to Simon (as executor of the estate) and is clearly against the interest and spirit of the last will of the deceased. He further argued that the plaintiffs demanded the transfer not only of Lot 1070 but also Lot 1071. He said this is obvious from the reading of para 4 of the plaintiffs' affidavit in reply.

H OUR DECISION

[12] We will now deal with each of the grounds raised by Simon, the appellant.

I [13] As for the first ground on the total absence of evidence, we are aware that Simon in his affidavit in opposition and statutory declaration averred and declared that he had spent the amount RM158,563 on the medical bills and other expenses in taking care of the deceased during her lifetime. However we

are of the view that this is insufficient. It is incumbent on Simon who claimed and asserted that he had spent the amount which he said is recoverable from the estate to show more cogent evidence of the spending by producing medical receipts and household bills that he had paid. It is pertinent to note and consider that Simon has his own business. He claimed that he was working as a mechanic and that the deceased was at that time staying with him. In our view, for Simon to recover the money that he had spent on the deceased in taking care of her before her death, the spending must be exclusively for the benefit of the testator then. If it is a mixed expenditure which includes also expenses for the benefit of Simon and his family, that expenses must be separated and excluded. In this case Simon had not produced or exhibited any documentary evidence in his affidavit of the various payments that he had made throughout the years in taking care of the deceased. Therefore in our opinion, the learned Judge was right to hold that there is a total absence of evidence to support Simon's claim.

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[14] As for the second ground that the sum of RM158,563 purportedly expended by Simon is legally recoverable, we are of the view that this issue does not arise at all. Firstly, the last will of the deceased is silent on the recoverability of the money spent for her benefit by the named executor of the last will. Paragraph 2 of the last will reads:

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2. I hereby direct and authorise my Executor of this my last will to collect all monies due to me from any and all sources and/or which may accrue to me in future and to hold trust and after paying my just debts, my household bills, my medical bills, funeral and any testamentary expenses to distribute the same in accordance with this my last will.

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[15] It is obvious that reading that para 2 of the last will, there is no provision for the executor to recover any of the expenses that he had undertaken for the sole benefit of the deceased (as testator) from the estate. On the contrary, our view is that para 2 of the last will imposes obligation on the executor to collect all monies due to the testator from any source where current or in the future and to hold the moneys collected in trust for the testator after paying for the testator's just debts, household bills, medical bills, funeral expenses and any testamentary expenses to distribute the same in accordance with the wishes of the testator in her last will. In other words the money that is to be used for the expenses of the testator either during her lifetime or at her death are to be paid out from the estate. In this case Simon, as the executor of the deceased estate, had not shown any evidence of any money collected for and on behalf of the estate. Simon also had not shown any evidence that the estate at the material times did not had sufficient funds to pay for all the bills and expenses incurred by the testator, so much so that he had to meet the testator liabilities by dipping into his own pocket.

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- A [16] In the circumstances, we agree with the learned judge that to enable Simon to claim the sum RM158,563 as legally recoverable debt from the estate, he must show that the expenses he had incurred had been agreed by the deceased at the material times.
- B [17] As for the third ground, we are of the view that there is no merit in this submission. Learned counsel is right to say that Simon as the executor of the deceased estate has the authority under the provision of the last will to deal with the residue of the estate. However the residue of the estate could only come into play once all the obligations as to the principal distribution of the estate have been performed and what remain of the estate after the distribution is entirely at the discretion of the executor. In this case Simon, as the executor of the estate, had not completed the distribution of the estate according to the wishes of the testator in her last will and testament. Instead, Simon simply refused to distribute the estate in accordance to the terms of the last will to the other beneficiaries of the estate ie the plaintiffs/respondents after he had transferred what was due to him from the estate. Therefore, there cannot be any residue in the estate for Simon to distribute to his children who were not named in the said last will of the deceased, even if he had wanted to, under the power given to him under the said will.
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- F [18] With respect to the fourth and fifth grounds relating to the caveat entered by Simon on Lot 1070, we are of the view that the grounds stated by Simon in his statutory declaration to support the entry of the caveat do not disclose any caveatable interest. The sum of RM158,563 claimed by Simon as expenses he had expended on the deceased has not been proved to be legally recoverable debt from the estate. Learned counsel's argument that the plaintiffs in this case were demanding all the lands left by the testator and not just Lot 1070 is unsustainable and not supported by evidence. Firstly, Lot 1071 had been transferred to Simon; and the plaintiffs is not challenging this. Secondly, from the cause papers we are satisfied that the plaintiffs only claimed what is rightly due to them under the last will that is Lot 1070. Therefore we are of the view that in so far as the caveat is concerned there is no serious issued to be tried. Thus, the balance of convenience does not favour Simon to have the caveat remains on the said land until he can prove his entitlement to be repaid the amount of RM158,563 that he claimed he had purportedly expended for the benefit of the deceased, the testator of the last will and testament.
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- I [19] For the above reasons we dismissed this appeal with cost of RM5,000 to the respondents/plaintiffs and we affirmed the High Court decision.

Appeal dismissed with costs of RM5,000.

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Reported by Dzulqarnain Ab Fatar

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